

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1265

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

GARY COLE, et al

Defendant-Appellant.

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

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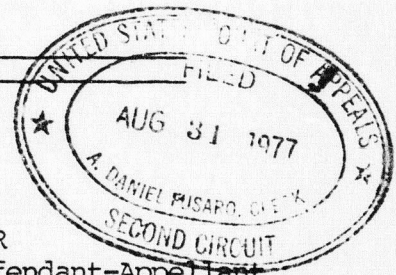


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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

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GARY COLE, et al,

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was error for the Trial Judge to deny the Appellant, Gary Cole's, motion to suppress identification testimony at the trial of the matter herein, and thereby permit a jury to determine the weight to be given to such identification testimony.

STATEMENT PURSUANT TO RULE 28 (a) (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on the 6th day of June, 1977, after a plea of guilty on May 17th, 1977, in the United States District Court for the Western District of New York before the Honorable John T. Elfvin, District Court Judge, convicting the Appellant, Gary Cole, of the crime of bank robbery in violation of Title 18, United States Code, Section 2113 (a).

The Appellant, Gary Cole, was sentenced to the custody of the Attorney General for a period of eight years, but the imposition of sentence was suspended and the Appellant was then and there placed on probation for a period of five years.

The Appellant, Gary Cole, is presently incarcerated by the New York State Department of Corrections as a result of a parole violation being lodged against him which emanated from the present incident.

STATEMENT OF FACTS

A two-count indictment charged the Appellant, Gary Cole, Alphonso Handley, Dennis R. Martin and Zachary R. Martin with violations of Title 18, United States Code, Sections 2113 (a) (2) and 371 in that on or about November 26th, 1976, the Appellant, Gary Cole, did willfully and unlawfully by force and violence and by intimidation attempt to take money from the Manufacturers & Traders Trust Company, a bank whose deposits are insured by the Federal Deposit Insurance Corporation and that the Appellant, Gary Cole, was aided by the other defendants. Additionally, Count Two of the indictment charged all defendants with a violation of Title 18, United States Code, Section 371 in that on or about November 26th, 1976 all of the defendants were alleged to conspire to commit the aforesaid violation, and in that various other acts were performed in furtherance of the alleged conspiracy.

A pre-trial hearing was held on February 14th, 1977 in the United States District Court for the Western District of New York Buffalo, New York before the Honorable John T. Elfvin, United States District Judge, for the purpose of determining the admissibility of the identification and testimony of the eyewitness. At that proceeding the Government presented the testimony of the four witnesses who at that time would be offered at the trial of this indictment to give identification testimony relative to the Appellant, Gary Cole.

One of the witnesses called by the Government was Miss Sarah Johnson, who was employed by the Manufacturers & Traders Trust Company, Buffalo, New York. Miss Johnson testified that on the morning of November 26th, 1977 while at work and situated in the ~~rear~~ of the bank she noticed someone walking by the bank who appeared to her to be suspicious (49-50). She then advised her boss of this fact, and then returned to the front of the bank where her teller's cage was located. Miss Johnson next observed the same individual walking by the front of the bank and looking into the window as if to look at the clock located there (51).

After being at her teller's cage for approximately five minutes, Miss Johnson then noticed an individual who cut across the teller line and stood behind a customer whom at that time Miss Johnson was waiting on (64). Continuing to take care of her customer, the next time Miss Johnson looked up this particular individual was gone because another teller, Elizabeth Malary, had indicated that she would take him as a customer (64-65). The aforementioned individual is the person that Miss Johnson has indentified as the Appellant, Gary Cole.

Miss Johnson indicated that the only time she saw this individual was when he came behind her customer, and it was for a period of time which is described as a little longer than five seconds (65-67). Miss Johnson also indicated that she saw this individual as he was entering the bank, from a distance of approximately 50 feet (67).

After the individual Miss Johnson has identified as the Appellant, Gary Cole, left from behind her customer, Miss Johnson did not see him with the other teller nor did she see him leave the bank (66-67). Consequently, the only time Miss Johnson observed who she claims to be the Appellant, Gary Cole, was when he was entering the bank and when he was behind her customer, and these observations were made during a period of time described as a little longer than five seconds. Miss Johnson also gave a physical description of the individual who she identified as the Appellant, Gary Cole, as being approximately five feet, five inches tall, 160 pounds, approximately 23 years of age and wearing a black leather coat and gray hat (66-67),

On November 26th, 1976, Mrs. Elizabeth Malary was employed as the head teller at the Manufacturers & Traders Trust Company at the branch located at Hertel and Parkside Avenue, Buffalo, New York. During the morning of that day, as Mrs. Malary was waiting on a woman customer, an individual dressed in a knee length, black leather coat with the collar pulled up and wearing a hat which was pulled down halfway over the forehead came into the bank and directly to Mrs. Malary's teller station and stood directly behind the customer of Mrs. Malary (125-126). At this point Mrs. Malary asked this individual to stand in line, but instead he moved to the next teller's station occupied by Miss Sarah Johnson (126). At this point Mrs. Malary completed her transaction and she noticed that the individual appeared to look angry at her, so

Mrs. Malary decided to take care of this customer at her window (127). At this point, this particular individual presented Mrs. Malary a bag with a note in it which she testified stated "this is a robbery, give your money or you will die." (127). The witness then stated that she started to panic and pretended to faint by falling backwards, whereupon this individual turned around and walked out of the bank with his back towards Mrs. Malary (127). A short time later Mrs. Malary identified, at the bank, the individual who presented her with the note as the Appellant, Gary Cole.

Mr. Douglas Murdoch, was a customer in the Manufacturers & Traders Trust Company Bank that morning of November 26th, 1977. As Mr. Murdoch was leaving the bank he noticed an individual at a teller's cage whom he thought was strange because he had his hand in his coat (97-98). Mr. Murdoch stated that his observations of this individual occurred as he brushed by the individual on the way out of the bank, and he saw him for a very short period of time, only long enough to walk by him and look at him (98-99). However, Mr. Murdoch indicated that he did not see this person face-to-face (114). When Mr. Murdoch left the bank he decided to pull his car to the driveway in the parking lot across the street from the bank and wait there, since he felt that something may be occurring in the bank as a result of the individual he observed (100-101).

Mr. Murdoch waited in his car for a short period of time and next saw an individual who was dressed the same as the one he had observed in the bank run out the bank and across the street (101, 113-115). The

witness followed this individual in his car for a short period of time, viewing him from the back only, and then returned to the bank after seeing him enter a motor vehicle (101-105). Mr. Murdoch further indicated that when the individual came running out of the bank he still did not see his face at all (114).

When Mr. Murdoch returned to the bank after his pursuit, he retrieved the hat which he saw fall off the individual who was running, and he further gave the police the best description he could of that individual as being tall and slim and wearing a three-quarter length dark coat and a hat with a large brim (105-106). While at the bank Mr. Murdoch identified the Appellant, Gary Cole, as the individual he had observed.

The remaining witness who gave testimony at the hearing before the Trial Judge was Frank J. Garwol. The testimony of this witness will not be discussed herein since it was the position of the Assistant United States Attorney handling this matter that Mr. Garwol's testimony would not be used at the trial of this matter; presumably because Mr. Garwol identified a different individual in Court than he had previously identified at the bank and at the preliminary hearing (31-33).

Approximately thirty to forty-five minutes after the alleged incident in the bank four black male individuals were brought back to the bank in custody for viewing by all of the prospective witnesses (81). At this point the four individuals were handcuffed (107). Additionally,

only one of the individuals was wearing a knee-length leather coat (138). The individuals who were returned to the bank were required to stand in a line, handcuffed, and further a gray, felt, wide brimmed hat was placed on each of their heads by a police officer (109). After this was done each of the witnesses was then asked to make an identification.

Sarah Johnson identified two individuals, one of whom was the Appellant, Gary Cole (56). However, prior to her identification Miss Johnson was advised by an agent of the Federal Bureau of Investigation that some individuals who were suspects in the bank robbery were going to be brought into the bank for her to view (70). She saw these individuals brought into the bank by police officers, and was aware they were in custody at that time (67). Miss Johnson further testified that only one of the individuals was wearing a three-quarter length coat which was similar to the one she had previously seen on the the individual that day, and that this fact aided in her identification of the individual (72-73). Although the gray hat was placed upon this individual's head, Miss Johnson claims that the hat did not aid her in the identification, for she claims the identification came about prior to the hat being put on the person's head (73-74).

Noteworthy here is the fact that Miss Johnson at the hearing before Judge Elfvin identified two individuals; the Appellant, Gary Cole, as the individual on the inside of the bank, and Alphanso Handley, as the individual on the outside of the bank. At the preliminary hearing

of this matter, the Appellant, Gary Cole, was not present due to his confinement to a hospital but the defendant, Alphanso Handley, was present at those proceedings. When asked at that proceeding to make an identification, Miss Johnson could not identify any of the three individuals who were present at that time (78). When questioned about this change in identification at this proceeding Miss Johnson stated that her inability to identify Alphanso Handley at the preliminary hearing was probably because of the change of dress between the time she saw him in the bank and at the preliminary hearing (82).

The witness, Elizabeth Malary, was also present in the bank when the four black individuals were returned for the purpose of identification (135). Mrs. Malary was also aware that these individuals were returned to the bank by the police and that she knew at that time they were suspects in the robbery attempt (136). Mrs. Malary noted that only one of the individuals had a knee length coat similar to the type which the person had worn in the bank previously, and this fact aided her in identifying this individual (138). Additionally, as the hat was placed on this particular individual's head and the brim pulled down, this also aided Mrs. Malary in making her identification of the Appellant, Gary Cole (139). At this time, while in the bank, Mrs. Malary identified one individual, the person wearing the three-quarter length leather coat and hat, who was later identified as the Appellant, Gary Cole.

During the proceedings at the identification hearing Mrs. Malary was requested to identify the individual whom she had previously selected at the bank. Mrs. Malary pointed to one, requested him to stand up, and stated that "he looks familiar" but was unable to say with certainty that this was the same individual whom she had previously identified in the bank (140).

The witness, Douglas F. Murdoch, was also requested to attempt to make an identification from the four individuals which were brought to the bank after the attempted robbery. Mr. Murdoch testified that he saw the individuals brought into the bank with handcuffs and assumed that they were suspects in the bank robbery (107). As in the other identifications, Mr. Murdoch also noted that all the individuals were black and that only one of them was wearing a three-quarter length coat similar to the one previously worn by the individual in the bank (108). Once again, a hat was placed upon each of the individuals' heads, and Mr. Murdoch then made his identification of the Appellant, Gary Cole, after the hat had been placed on his head (109). Mr. Murdoch testified that the placing of the hat on the individual's head surely aided him in making his identification, and the fact that he had the three-quarter length black coat on at this time aided Mr. Murdoch because he did in fact identify the man with the coat (110). It appears that the only means used by Mr. Murdoch to identify was the coat and hat, since when testifying as to the individual he saw run from the bank he stated that the only thing he recognized about this person was the coat and hat since he had not come face to face with him (114).

Mr. Murdoch was also requested to identify the individual he had selected on November 26th, 1976 at the identification hearing, but after standing up and looking directly at the individuals, he was unable to identify anyone as the person he had seen in the bank that day (111).

At the termination of these proceedings, the Trial Judge, Honorable John T. Elfvin, ruled that there was not sufficient basis to suppress any identification testimony, and that a jury should be permitted to decide the reliability and accuracy of this testimony (247-249). After this ruling a plea as set forth in the preliminary statement herein was entered by the Appellant, Gary Cole, with a reservation of his right to appeal to this Court upon the issue presented by this appeal.

POINT ONE

IT WAS ERROR FOR THE TRIAL JUDGE TO DENY
THE APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION
TESTIMONY, AND THE JUDGMENT
SHOULD THEREFORE BE REVERSED.

The most recent case addressing itself to the issues presented is Manson v. Brathwaite, ___ U S ___, 53 L Ed 2d 140, 975 Ct 2243 (1977) wherein the United States Supreme Court held that:

"We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in Biggers. 409 U S, at 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the

witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

By thus holding, the United States Supreme Court has rejected a per se rule wherein once it had been found that an unnecessarily suggestive identification procedure had been employed this alone required the exclusion of the evidence itself. Since the latest approach by the United States Supreme Court in this area is basically a totality of circumstances approach, one must proceed on a case-by-case basis and apply the various factors set forth by the United States Supreme Court.

It is probably fair to say that the opportunity to view the individual identified as the Appellant, Gary Cole, was an extremely short period of time, Sarah Johnson described the period of time as a little longer than five seconds, while for Douglas Murdoch it was probably less than that since his confrontation was in a mere passing. Mrs. Malary's confrontation with the individual was probably slightly longer than Miss Johnson's since she was the one that was directly involved with the transaction. However her confrontation with this individual, considering the other times involved, probably did not exceed ten to fifteen seconds. Additionally, the face of this individual should not be considered clearly visible since the collar on his coat was pulled up, and his wide brimmed hat was pulled down over his forehead (66). It is significant to note that the one witness,

Elizabeth Malary, who probably viewed the individual in the bank longer than any other witness in the bank was unable to identify him at the identification hearing.

The next factor to be considered is the degree of attention which was paid by the witness to the individual being identified. For all the witnesses who testified at the identification hearing, this was the first occasion on which they had ever come in contact with this individual. Furthermore, the witnesses, Sarah Johnson and Douglas Murdoch, had no particular reason to direct any specific attention to this individual other than the fact that they felt he was suspicious. At most, Sarah Johnson testified that she saw this individual, whom she identified as the Appellant, Gary Cole, for a period described as a little longer than five seconds, but during this period of time Miss Johnson testified that she was also attending to bank business.

With regard to Mr. Murdoch, he only saw this individual identified as the Appellant, Gary Cole, for the period of time it takes to brush by a person while walking, and at that Mr. Murdoch testified that he did not see this person face-to-face.

The person to whom the robbery note was handed, Mrs. Elizabeth Malary, also only viewed this individual for a short time, but was the only witness confronted by this individual directly as a bank robber. Yet, although Mrs. Malary probably had the best opportunity to observe this individual, she was still unable to identify any person at the identification hearing.

One could therefore conclude that at most the degree of attention paid to the individual by these witnesses was slight due to their pre-occupation with other matters and the extremely short period of time they viewed this person

The accuracy of the description given by the witnesses to the authorities is even in dispute amongst the witnesses themselves. While Mr. Murdoch described this individual as tall and slim (105), Mrs. Malary just gave a general physical description of the individual as being a little taller than five feet, two inches (134). Miss Johnson described the individual identified as the Appellant, Gary Cole, as being approximately five feet, five inches and weighing about 160 pounds (66-67). On the face of it there appears to be a great disparity between the description given by Mr. Murdoch and that given by Mrs. Malary and Miss Johnson.

However, a significant part of each witness description of this individual was the fact that he was wearing a black or dark three-quarter length leather coat and a gray felt hat with a wide brim. The foregoing description of the clothing of the individual is the most common thing to all of the descriptions given by each witness.

At the time these witnesses viewed the Appellant, Gary Cole, and others at the bank a short time after the attempted robbery, they each identified the Appellant, Gary Cole, as the individual being inside the bank. At the identification hearing only one witness, Sarah Johnson, was able to identify the Appellant, Gary Cole. At the identification hearing the witnesses, Elizabeth Malary and Douglas Murdoch, were unable,

after viewing the defendants in the courtroom, to select the individual they had previously identified as the Appellant, Gary Cole. It should be noted that quite naturally the Appellant, Gary Cole, was not wearing a black three-quarter length jacket and gray felt hat with a wide brim at the proceedings in the District Court. It is also submitted that Miss Johnson's identification at the identification hearing should be subject to some scrutiny since at that proceeding she identified an additional individual whom she had previously been unable to identify at the preliminary hearing before the Magistrate (82).

The time between the crime and the confrontation here is approximately one-half hour to forty-five minutes. Although the incident may have been fresh in the minds of the witnesses, so also would have been the influence of having the Appellant, Gary Cole, viewed, dressed in a three-quarter length black leather coat and a gray felt hat with a wide brim.

Against the aforementioned facts, one must now balance the "corrupting effect of the suggested identification itself." To say that the showup procedure employed in this case was suggestive is understating the point since the Appellant, Gary Cole, was the only individual in that showup who was attired in a black leather, three-quarter length coat and a gray felt hat with a wide brim. Although there were four individuals in the showup at the bank, it is submitted that such a showup with a person dressed, as was the Appellant, Gary

Cole, is tantamount to a one-on-one confrontation which has been widely condemned in recent cases. Stovall v. Denno, 388 U S 293, 18 L Ed 2d 1199, 89 S Ct 1967 (1967).

Although the present case is not factually identical to Foster v. California, 394 U S 440, 22 L Ed 2d 402, 89 S Ct 1127 (1969), it does exhibit some common elements to that case. While condemning unfair lineup procedures as undermining the reliability of eyewitness identification, the Court in Foster made reference to several facts which contributed to an unfair lineup. After the defendant in Foster had been arrested, the victim of an armed robbery was called to the police station to view a three man lineup. One man was the defendant, who was about six feet tall, while each of the other two men was several inches shorter. Additionally, the defendant was the only one to wear a leather jacket similar to the one which the victim had described as having been worn by the robber. The Supreme Court noted that in this first lineup the "petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber." Id., at 443.

While other factors were present in Foster v. California, Id., it is important to note that the Court was mindful of the fact that showup procedures, such as were used in the present case, lend themselves to suggestiveness and misidentification.

It is submitted that the identification here was "so impermissibly suggestive" that it gave "rise to a very substantial likelihood of irreparable misidentification." The proof that such a suggestive showup of procedure, as herein employed, gives rise to a substantial likelihood of irreparable misidentification is in the results of the identifications or non-identifications which took place at the hearing. Although two witnesses made identifications of the Appellant, Gary Cole, at the bank, they were unable to make any identification at the hearing where the Appellant, Gary Cole, was dressed differently and in different surroundings. This is especially so of Mr. Murdoch who admitted that he did not see the face of the individual in the bank but only identified him through the coat and hat. Even Miss Johnson admitted that she was aided in her identification at the bank by the use of the coat and the hat upon the Appellant, Gary Cole. Additionally, it appears that the entire showup procedure employed here was unnecessary since proper precautions could have been taken to protect the rights of the Appellant, Gary Cole, by employing the use of a proper line-up procedure.

As a general guideline in cases such as these Neil v. Biggers, 409 U S 188, 34 L Ed 2d 401, 93 S Ct 375 (1972) stated:

"It is the likelihood of misidentification which violates a defendant's rights to due process, and it is this which was the bases of the exclusion of evidence in Foster. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous". 409 U S at 198

The suggestiveness of this confrontation is clear as a result of the emphasis which the witnesses placed upon the dress of the individual in the bank. Furthermore, the whole confrontation at the bank was unnecessary because the authorities had the ability to conduct a lineup with proper safeguards to the Appellant, Gary Cole.

As a result of the identification procedure hearing the likelihood of misidentification is great and therefore testimony at trial relating to the out of Court identification itself would violate the Appellant, Gary Cole's, right to due process of law. Additionally, if reliability is going to be the "linchpin" in determining the admissibility of identification testimony, then the witnesses' identification here must be subject to great scrutiny due to the effect upon it of the suggestive showup procedure itself.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the identification testimony herein suppressed and the case remanded for further proceeding.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

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THE UNITED STATES OF AMERICA,

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A F F I D A V I T

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Docket No. 77-1265

Defendant-Appellant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

PATRICK J. BAKER, being duly sworn, deposes and says that:

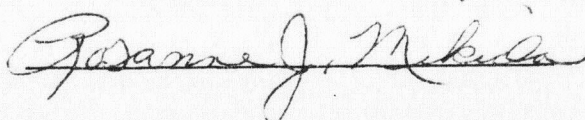
1. Your deponent personally served two copies of the Brief for the Appeal herein upon the United States Attorney for the Western District of New York on August 30, 1977.



PATRICK J. BAKER

Sworn to before me this

30th day of August, 1977.



ROSANNE J. MIKIDA
COMMISSIONER OF DEEDS
in and for the City of Buffalo, N. Y.
My Commission Expires Dec. 31, 1978